Office-Supreme Court,
FILED
MAR 5 195
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ELISHA HANSON,
ARTHUR B. HANSON,
Attorneys for Petitioner.

INDEX

Page

Petitions:

A. Statement of Matters Involved 2
B. Jurisdiction 6
C. Statutes Involved 6
D. Constitutional Provision Involved 6
E. Questions Presented 6
F. Reasons Relied on for the Allowance of the Writ 8

Brief:

I. Preliminary Statement 11
II. Summary of Argument 11
III. Argument 12

Point 1. The decision of the Court of Claims established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in conflict with the decision of this Court in *United States* v. *New River Collieries Co.*, 262 U. S. 341 13

Point 2. The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their product and to deliver those percentages to the United States at prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the case of *Monongahela*

Page

Navigation Co. v. *United States,* 148 U. S. 312; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; and *United States* v. *New River Collieries Co.,* 262 U. S. 341 14

Point 3. The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of price because it took 45 percent of petitioner's product, whereas thousands of other customers took the remaining 55 percent in smaller quantities, is in conflict with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312 and *United States* v. *New River Collieries Co.,* 262 U. S. 341 15

Point 4. The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court, namely, *United States* v. *Felin Co.,* 344 U. S. 624; and *United States* v. *Commodities Trading Corporation,* 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases respondents were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer 16

Point 5. The award of the Court of Claims of the amount of $267,669.74 was appropriately made as a part of the measure of just compensation to which petitioner is entitled, but was wholly inadequate to put peti-

Page

tioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion 17

Point 6. The Court of Claims quite properly granted to petitioner the sum of $267,779.74, but the Court erred when it determined that this was the full measure of just compensation rather than just a part of the measure of just compensation 17

Point 7. The Court of Claims erred in not allowing interest as just compensation in computing its judgment in favor of petitioner 18

Conclusion 19

CITATIONS

Cases:

Boston Sand & Gravel Co. v. *United States*, 278 U. S. 41 ..... 9, 10, 19

Brown v. *United States*, 263 U. S. 78 18

Jacobs v. *United States*, 290 U. S. 13 ..... 10, 19

Liggett & Myers Co. v. *United States*, 274 U. S. 215 .. 18

Monongahela Navigation Co. v. *United States*, 148 U. S. 312 ..... 8, 9, 12, 18

Phelps v. *United States*, 274 U. S,. 344 18

Safeway Stores, Inc. v. *Bowles*, 145 F. 2d 836 13

Safeway Stores, Inc. v. *Bowles*, 145 F. 2d 846 13

United States v. *Cohen Grocery Co.*, 255 U. S. 81 .... 8, 12

United States v. *Commodities Trading Corporation*, 339 U. S. 121 ..... 5, 7, 9, 12, 17

United States v. *Felin & Co.*, 334 U. S. 624 ..... 7, 9, 12

United States v. *New River Collieries Co.*, 262 U. S. 341, 343 ..... 8, 9, 12, 13, 17

United States v. *Thayer-West Point Hotel Co.*, 329 U. S. 585 ..... 10, 19

Constitutional Provisions:

Page

Fifth Amendment to the Constitution of the United States 6, 15

Statutes:

Title 50, App. U.S.C.A. § 901 Act January 30, 1942, c. 26, 56 Stat. 23 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Safeway Stores, Incorporated, respectfully prays for the issuance of a writ of certiorari to review the decision and judgment of the United States Court of Claims rendered December 5, 1950, in the case of Safeway Stores, Incorporated, v. United States of America, No. 46976. Petitioner prays that this writ be issued only in the event that this Court grants the petition of the United States in No. 590 at this term.

The opinion and judgment of the Court of Claims was entered on the 5th day of December, 1950, and is reported at 93 F. Supp. 900. The record was settled by order of the Court of Claims on February 16, 1951. (R. 43).

A

Summary Statement of the Matters Involved

Petitioner, a Maryland corporation, at all times pertinent in this controversy, was an integrated retail food chain store organization operating more than 2300 retail food stores, including grocery and meat departments, in 23 states and the District of Columbia (R. 28).

Petitioner's usual habit of doing business was to manufacture, process or purchase commodities and distribute only through its retail stores to the ultimate consumer. At no time did petitioner operate as a wholesaler in any phase of its business (R. 28).

In 1943, petitioner was unable to supply its retail outlets with meats by purchase so it bought the Nebraska Beef Company of Omaha on June 29, 1943, and began to operate it as a division of petitioner's business on July 3, 1943 (R. 28).

At that time incident to the war effort certain controls were in force throughout the meat producing and marketing industry but no controls existed on the price of live bovine animals to the slaughterer. Such controls were not created until January 29, 1945 (R. 29).

Compliance with all the war time controls was a prerequisite to doing business (R. 29).

Prior to January 29, 1945, in an effort to keep slaughterers in business, a system of subsidies was devised. This system was designed to enable slaughterers to sell in a controlled market although their raw materials were purchased in an uncontrolled market (R. 29). Included in the system were basic subsidies paid to all slaughterers and an additional subsidy of 80 cents per hundred weight paid to non-processing slaughterers (R. 33-34).

The Nebraska Beef Company was what is known in the trade as a "non-processing slaughterer" and was pur-

chased for the purpose of supplying carcass beef to petitioner's retail stores in the Washington, D. C., and New York, N. Y., divisions (R. 29) (R. 73).

Petitioner's Nebraska Beef Company division was subject to certain Government directives entitled set aside orders which required petitioner, subject to criminal penalties for failure to do so, to set aside and hold for delivery to the United States varying percentages of all beef slaughtered each week (R. 29-30). The set aside beef was selected by government agents and had to be accounted for by petitioner to the United States before petitioner could ship any beef to its retail stores.

In accordance with these compulsory set aside orders, the petitioner did deliver to the United States 23,790,296 pounds of carcass beef, amounting to 45 per cent of its total product (R. 30).

Maximum Price Regulations numbered 169 and 355 governed sellers of meat at wholesale and retail, respectively (R. 30).

Petitioner sold all its meat other than that requisitioned by the government through its own retail stores at or below the lowest price authorized under MPR 355. Petitioner as a retailer was obligated to operate under MPR 355. It never sold any meat to anyone under MPR 169. Notwithstanding the fact that petitioner was subject to MPR 355 and not to MPR 169, the United States used MPR 169 to fix the price it paid for the beef which was set aside under its requisitions, namely, the aforementioned 23,790,296 pounds (R. 32).

Accordingly the United States paid to petitioner $5,053,-268.04 for the 23,790.296 pounds of beef taken by it. This sum included $543,321.32 basic slaughterer's subsidy which would have been paid whether or not the United States had taken the meat (R. 30-31).

This payment failed to cover petitioner's actual plant

expense at the slaughtering level by $491,412.96 on the seized beef (R. 33).

Furthermore the United States refused to pay the non-processing slaughterer's subsidy of 80 cents per hundred weight of beef slaughtered which amounted to $267,779.74 (R. 34). This subsidy was denied for the stated reason that petitioner would realize as overall profit at retail. This reasoning failed to recognize that no opportunity for such profit was available on the beef seized by the United States at the plant level (R. 192) (R. 189) (R. 34).

Petitioner could and would have sold this seized beef through its retail stores in its Washington and New York divisions and had it been permitted to do so petitioner would have realized a net minimum after costs and credits of $1,035,572.70 (R. 33). This is the amount which Petitioner would have realized by selling the seized beef in its usual habit of doing business or if the United States had paid it in accord with petitioner's method of doing business (R. 31).

More than enough red stamps were available to consumers in the Washington and New York markets for them to purchase this amount of beef from petitioner in addition to the supplies petitioner was enabled to offer in the markets.

The Court of Claims found there was a definite and unequivocal taking of petitioner's property by the United States through the enforcement of its set aside orders requiring petitioner to set aside and hold for the United States that percentage of its slaughter ordered by the United States. The Court of Claims further found that petitioner was under compulsion to deliver to the United States the beef so set aside and did so deliver it and still further that petitioner had never agreed to or consented to the price offered by the United States but on the contrary protested it and expressly reserved the right to demand and to receive all that petitioner was entitled to receive for its property so taken (R. 35-36).

On this point of what petitioner could and would have received, the Court of Claims said that the plaintiff (petitioner herein) sold 55 percent of its product in the retail market, a steak here, a roast there, to thousands of customers; whereas, the remainder of its product, 45 percent, was sold to one customer and manifestly this one customer taking nearly one half of petitioner's entire output should not have to pay the same price as the one-steak or the one-roast customer (R. 36).

Also the Court said that when petitioner entered the business it knew the United States was taking a large part of the output of all meat packers and was paying them therefor only the wholesale price and petitioner knew it would not be permitted to operate if it did not consent thereto, even though under compulsion. Therefore, it held that petitioner could claim only whatever was just compensation on the wholesale market (R. 36).

The Court of Claims then found that petitioner was entitled to just compensation in the wholesale market and after so finding awarded petitioner the amount of $267,-779.74 (R. 39). In arriving at this amount, the Court thereby denied petitioner's claim that the value of the property seized by the United States was what petitioner could and would have realized from the sale of that property in that market in which petitioner was legally bound to operate (R. 73).

In reaching its decision the Court of Claims took note of the decision of this Court in the case of the *United States* v. *Commodities Trading Corporation,* 339 U. S. 121, in which case this Court held that in the absence of exceptional circumstances ceiling prices were controlling on the subject of just compensation (R. 37). The Court of Claims further found that although petitioner was not a wholesaler it was paid the ceiling price fixed for those who sold meat wholesale but that the government in paying this price failed to compensate petitioner with the amount of the non-proces-

sors' subsidy authorized to compensate packers who did not sell byproducts for their loss at the manufacturing level. (R. 37). This latter subsidy, the Court of Claims found, was denied petitioner on the ground that it could recoup its losses through its profit on retail sales (R. 38). The Court of Claims further found that perhaps this was justified as to the meat petitioner sold at retail, but it obviously was not justified as to the meat petitioner did not sell at retail, but which was taken by the government at wholesale prices; and finally that petitioner was entitled to no less than the subsidy on the beef so taken (R. 38).

One of the judges of the Court of Claims dissented from the majority opinion, and the Chief Judge did not sit in the case (R. 39-40).

B

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Claims on writ of certiorari is invoked under 28 U. S. C. 1255.

C

Statutes Involved

Title 50, App. U. S. C. A. § 901 Act January 30, 1942. c. 26, 56 Stat. 23.

D

Constitutional Provision Involved

The Fifth Amendment to the Constitution of the United States.

E

Questions Presented

1. Whether in a suit for just compensation pursuant to the Fifth Amendment to the Constitution of the United

States, the Court of Claims erred in holding that compensation may be justly and fairly measured by the maximum ceiling price prescribed by the Price Administrator for wholesalers when the property taken was taken from a retailer.

2. Whether in such a suit for just compensation the Court of Claims erred in holding in effect that when the United States promulgated its requisitioning orders so as to obtain adequate supplies for our armed forces during the war effort, the United States had the power to fix the price for property taken thereunder in accordance with ceiling prices fixed for one type of business when the property was taken from one engaged in another type of business.

3. Whether the Court of Claims erred in holding that the statutes empowering the United States to fix prices authorized the United States to say what anyone must take for any property of his taken by the government for its own use.

4. Whether, in the absence of agreement between the owner and the United States as to the price to be paid by the United States for property taken by it pursuant to requisitioning orders, the United States may determine through an executive order what is just compensation for the property so taken.

5. Whether the Court of Claims erred in holding that because the United States took 45 percent of petitioner's product it was entitled to preferential treatment in the matter of price and thereby was entitled to pay an amount less than petitioner received for the balance of its product in the market where petitioner did business.

6. Whether the Court of Claims erred in holding that this case is controlled by two decisions of this Court, namely, *United States* v. *Felin and Company*, 334 U. S. 624, and *United States* v. *Commodities Trading Corporation*, 339 U. S. 121.

7. Whether the award of the Court of Claims of the amount of $267,779.74 constituted just compensated in the circumstances of this case.

8. Whether the Court of Claims erred in not allowing interest as a part of just compensation in computing its judgment in favor of petitioner.

F

Reasons Relied On for the Allowance of the Writ

If the Court should determine to grant the petition for writ of certiorari in No. 590 at this term, it would appear that the entire case should be reviewed in the light of the opinion and judgment of the Court of Claims.

The Court of Claims has decided substantial questions of federal law of general importance which have not been but which should be settled by this Court.

1. The decision of the Court of Claims that the prices established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in conflict with the decision of this Court in *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343.

2. The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their slaughter and to deliver those percentages to the United States at the prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *United States* v. *New River Collieries Co.*, 262 U. S. 341; and *United States* v. *Cohen Grocery Co.*, 255 U. S. 81.

3. The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of prices because it took 45 per cent of petitioner's product, whereas thousands of other customers took the remaining 55 per cent in small quantities, is in conflict with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; and *United States* v. *New River Collieries Co.,* 262 U. S. 341.

4. The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court, namely *United States* v. *Felin Co.,* 334 U. S. 624, and *United States* v. *Commodities Trading Corporation,* 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases both of the parties were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer.

5. The award of the Court of Claims of the amount of $267,779.74 was appropriately made as a part of the measure of just compensation to which petitioner is entitled, but was wholly inadequate to put petitioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion. The proper measure of just compensation was what petitioner could and would have realized in the one market available to it prevailing at the time and place of the taking, namely the retail market, not what petitioner would have realized in an entirely different market of the United States' choosing. *United States* v. *New River Collieries Co.,* 262 U. S. 341.

6. The Court of Claims erred in not allowing interest as a part of just compensation in computing its judgment in favor of the petitioner. *Boston Sand & Gravel Co.* v.

United States, 278 U. S. 41; *Jacobs* v. *United States,* 290 U. S. 13; *United States* v. *Thayer-West Point Hotel Co.,* 329 U. S. 585.

The decision of the Court of Claims in measuring just compensation in this case resulted in an award wholly inadequate under the applicable decisions of this Court and therefore should be reviewed by this Court.

Wherefore, your petitioner prays that in the event this Court grants the petition of the United States in No. 590 and issues a writ of certiorari directed to the United States Court of Claims, it should grant this conditional cross petition and issue a writ of certiorari under the seal of this Court directed to the United States Court of Claims to the end that this controversy may be reviewed in its entirety and that the judgment of said Court of Claims shall be modified so as to grant to petitioner that measure of just compensation to which it is entitled, and for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

ELISHA HANSON,
ARTHUR B. HANSON,
Attorneys for Petitioner,
729 15th Street, N. W.,
Washington 5, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinion below, the statement of the matter involved, jurisdiction and the questions presented appear in the Conditional Cross Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

1. The decision of the Court of Claims that the price established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in

conflict with the decision of this Court in *United States* v. *New River Collieries Co.*, 262 U. S. 341.

2. The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their product and to deliver those percentages to the United States at prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; and *United States* v. *New River Collieries Co.*, 262 U. S. 341.

3. The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of price because it took 45 percent of petitioner's product, whereas thousands of other customers took the remaining 55 percent in smaller quantities, is in conflict with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 and *United States* v. *New River Collieries Co.*, 262 U. S. 341.

4. The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court; namely, *United States* v. *Felin Co.*, 344 U. S. 624; and *United States* v. *Commodities Trading Corporation*, 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases respondents were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer. (R. 28).

5. The award of the Court of Claims of the amount of $267,779.74 was appropriately made as a part of the measure

of just compensation to which petitioner is entitled, but was wholly inadequate to put petitioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion.

6. The Court of Claims quite properly granted to petitioner the sum of $267,779.74 but the Court erred when it determined that this was the full measure of just compensation rather than just a part of the measure of just compensation.

7. The Court of Claims erred in not allowing interest as just compensation in computing its judgment in favor of petitioner.

III

ARGUMENT

Point 1

The decision of the Court of Claims that the price established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in conflict with the decision of this Court in United States v. New River Collieries Co., 262 U. S. 341.

During the period in controversy there were two markets in which meat producers could dispose of their product. One was the wholesale market in which prices were governed by MPR 169. The other was the retail market in which prices were governed by MPR 355 (R. 30). Petitioner was a retailer and was obligated to confine its operations in sales to the retail market. It was determined both administratively and judicially that petitioner was not a wholesaler but a retailer. *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d 836; *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d 846. Cert. denied, 324 U. S. 847.

In *United States* v. *New River Collieries Co.,* 262 U. S. 341, two sets of market prices were involved. One set was for

the domestic market and the other for the foreign market. This Court rejected the lower domestic market prices as just compensation because they did not provide the monetary equivalent of the property taken by the United States or fully indemnify the owner by putting him in the same position pecuniarily that he would have been had his property not been taken. The property owner whose property was taken in the *New River* case was authorized to operate in both the domestic and the foreign markets.

Petitioner in the instant case was authorized to sell only in the retail market. Petitioner sold in no other market. The mere fact that over its protest the United States took its product and sought to pay for it at prices fixed by the United States for a market in which petitioner did not operate did not throw petitioner into that market.

POINT 2

The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their product and to deliver those percentages to the United States at prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the case of Monongahela Navigation Co. v. United States, 148 U. S. 312; United States v. Cohen Grocery Co., 255 U. S. 81; and United States v. New River Collieries Co., 262 U. S. 341.

In the *Monongahela Navigation* case this Court held that none of the statutes empowering the President or other executive agencies to fix prices authorized him or them finally to say what anyone must take for any property of

his wanted by the United States for its own use. In the *Cohen* case this Court held that the mere existence of a state of war could not suspend or change the guaranties and limitations of the Fifth Amendment. In the *Monongahela Navigation* case and the *New River Collieries* case it was held that in the absence of agreement between the owner and the government what is just compensation is a judicial question to be decided by the courts and not by the executive. In the instant case the Court of Claims erred in upholding the power of the United States to fix the price of products taken by it for public use when manifestly on the record the price so fixed neither compensated petitioner for the cost of manufacture nor placed it in the position it occupied when its product was taken under compulsion.

POINT 3

The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of price because it took 45 percent of petitioner's product, whereas thousands of other customers took the remaining 55 percent in smaller quantities, is in conflict with the decisions of this Court in the cases of Monongahela Navigation Co. v. United States, 148 U. S. 312 and United States v. New River Collieries Co., 262 U. S. 341.

There is nothing in either of these decisions or in any other decision of this Court so far as this petitioner has been able to determine that puts the United States in a preferential position simply because it takes more of a citizen's product for its own use than other persons may purchase in the available market for their use. It is submitted that because the Court of Claims made this holding this Court should pass upon it in the light of its many decisions to the effect that in the last analysis just com-

pensation simply means putting the person from whom property is taken for public use in as good a position pecuniarily as he would have been if his property had not been taken and in this instant case it is submitted that that position is the position which petitioner occupied in the retail market, not in some other market where it did not engage in business.

POINT 4

The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court, namely, United States v. Felin Co., 344 U. S. 624; and United States v. Commodities Trading Corporation, 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases respondents were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer.

As shown under Point 1 herein petitioner at all times during the period of this controversy was a retailer subject to Maximum Price Regulation 355. At no time was it a wholesaler subject to Maximum Price Regulation 169. Furthermore, the claim of petitioner, amply supported by evidence demonstrating that its Nebraska Beef Company Division was efficiently and effectively operated as a non-processing slaughterer, was based upon the lowest prices it was authorized to charge under MPR 355 or prices even lower than those as such lower prices prevailed in the market from time to time during the period of controversy (R. 107, 109; R. 114-116; *Safeway Shoes* v. *Bowles,* 145 F. (2d) 836, 840). The record is uncontroverted that had petitioner been able to realize what it could and would have realized in the only market where it did business the amount so realized would have been no less than $1,035,572.70 in excess of that paid by the United States for the meat taken

by the United States under its set aside orders (R. 120-126, 140).

POINT 5

The award of the Court of Claims of the amount of $267,779.74 was appropriately made as a part of the measure of just compensation to which petitioner is entitled, but was wholly inadequate to put petitioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion.

The proper measure of just compensation was what petitioner could and would have realized in the one market available to it prevailing at the time and place of the taking, namely, the retail market, not what petitioner would have realized in an entirely different market of the United States' choosing. *United States* v. *New River Collieries Co.*, 262 U. S. 141.

POINT 6

The Court of Claims quite properly granted to petitioner the sum of $267,779.74, but the Court erred when it determined that this was the full measure of just compensation rather than just a part of the measure of just compensation.

As pointed out by the Court petitioner was placed in one of those exceptional circumstances referred to by this Court in the case of *United States* v. *Commodities Trading Corporation*, 339 U. S. 121. Without entering into a discussion of the question as contended by the United States that a subsidy is a grant, a bounty which the sovereign may withhold from one and give to another at will, the Court of Claims found that as a matter of fact the non-processing slaughterers subsidy was granted by the United States in order to avoid an outright increase in the ceiling price (R. 38). Nevertheless the government denied that subsidy to this petitioner because petitioner operated retail markets.

The Court of Claims said that perhaps this was justified as to the meat petitioner sold at retail because on that portion of its product it could recoup its losses through its profits from retail sales as the United States contended, but the Court further held that petitioner was entitled to no less than this subsidy on that portion of its product taken by the United States because on what the government took it manifestly could recoup no loss through sales at retail. Therefore, the Court finally held that just compensation to petitioner

> "is no less than the wholesale selling price which has been paid it plus the amount of the subsidy all other non-processing packers were paid. This puts plaintiff on a parity with all other non-processing packers whose products were taken by the government."

The amount of the subsidy denied the plaintiff but received by similar packers was $267,779.74 and this was the Court of Claims' award to petitioner.

In making this award, however, the Court failed to place petitioner in that position pecuniarily that it would have been in had its product not been taken by the government and in that respect the Court of Claims decision is in conflict with the weight of authority of this Court. See *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327; *Brown* v. *United States,* 263 U. S. 78; *Liggett & Myers Co.* v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 344.

POINT 7

The Court of Claims erred in not allowing interest as just compensation in computing its judgment in favor of petitioner.

The judgment of the Court of Claims was silent on the matter of interest. Petitioner is entitled to interest not as

interest but as just compensation from the time of the taking of petitioner's property on the amount of money that represents the difference between what petitioner was paid by the United States and what petitioner is entitled to as a measure of just compensation. *Jacobs* v. *United States,* 290 U.S. 13; *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41; *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585.

Conclusion

It is respectfully submitted that for the foregoing reasons if this Court grants the petition of the United States in No. 590 it should grant this Cross Petition in order that all questions may be reviewed by this Court.

Respectfully submitted,

ELISHA HANSON,
ARTHUR B. HANSON,
729 - 15th Street, N.W.
Washington 5, D.C.
Attorneys for Petitioner.